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No. 1396

In the Supreme Court of the United States

OCTOBER TERM, 1969

ALLAN MAURICE GLEZERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Allan Maurice Glezerman respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on January 16, 1970.

OPINIONS BELOW

The judgment of conviction and sentence of the United States District Court for the Eastern District of Oklahoma is not officially reported. The opinion of the United States Court of Appeals for the Tenth Circuit filed on January 16, 1960 is not yet officially reported and is presented as an appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit affirming the judgment of conviction and sentence was filed on January 16, 1970. A petition for rehearing en banc was timely filed and denied on March 6, 1970. The jurisdiction of this court is invoked under and pursuant to 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the actions of the trial court deprived defendant of his Sixth Amendment right to trial by a fair and impartial jury by

(a) Assuming the role of an advocate during cross-examination of petitioner;

(b) Telling the jury that certain facts not conceded were not in dispute;

(c) Urging the jury to return a verdict on the afternoon the case was submitted to them; and

(d) Submitting only a guilty form of verdict.

2. Whether admission of statements of co-defendants not made in furtherance of the conspiracy at a joint trial violated the rule of *Bruton* v. *United States.*

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CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

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STATEMENT

Petitioner Glezerman was named, along with co-defendants Perella, Arrigo, McDaniel and Chambers, in a fifteen-count indictment charging the substantive offenses of use of the mails to promote a scheme to defraud in violation of 18 U.S.C. 1341 (counts 1 through 14) and with conspiracy to violate the same statute in violation of 18 U.S.C. 371 (count 15).

Prior to trial, Petitioner Glezerman moved for a severence and separate trial, which motion was denied.

The case was tried to a jury which returned verdicts of guilty against all defendants on all counts.

Petitioner was the owner of Oklahoma Brentwood Company which operated a referral selling business in Oklahoma City and Tulsa, Oklahoma, during part of the period of the alleged conspiracy (March 1, 1966 through December 11, 1967). Each co-defendant worked as an office manager for Petitioner during this period.

The company was engaged in the business of selling built-in or centrally installed vacuum cleaners to homeowners for the price of $899 for which customers would sign a contract which was discounted through finance companies. Customers were told that they could recoup the purchase price and earn commissions by providing Brentwood with the names of persons who might be interested in purchasing a vacuum cleaner. For the names of 25 qualified prospective purchasers, the customer was to receive $350 in commissions; for 50 qualified names, Brentwood would pay the customer $750; and if any of the prospective customers purchased a vacuum cleaner, the customer who submitted his name would receive a $100 commission.

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Persons whose names were referred to Brentwood were contacted by letter and telephone and invited to participate in the referral sales program. If an appointment could be arranged, a salesman would visit the home of the prospective customer and attempt to enroll them in the program as well as sell them a vacuum cleaner. The salesmen were supposed to keep records on whether or not referrals made purchases, but there was testimony that the slips were not always made out.

If a sale was made, the customer would sign a retail installment contract which was discounted through finance companies which would check with the purchaser to be sure that he understood the terms of the contract. There were few complaints about the quality of the merchandise which operated by and large to the satisfaction of the customers. The misrepresentations charged in the indictment related not to the quality of the merchandise but to the sales presentation and referral program.*

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* The facts are set forth in more detail in the opinion of the Court of Appeals (Appendix, pp. 1-16) and in the arguments as they relate to each point raised.

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REASONS FOR GRANTING THE WRIT

1. Petitioner was deprived of his Sixth Amendment right to a fair and impartial jury by the actions of the trial court in cross-examining defendant, advising the jury that certain facts were not in dispute, urging the jury to reach a verdict on the afternoon they received the case and submitting only one form of verdict (a "guilty" form).

Petitioner respectfully submits that he was deprived of the right to a fair and impartial jury guaranteed by the Sixth Amendment by the court's repeated invasions of the province of the jury during the course of the trial. As demonstrated more specifically below, Petititoner contends that the trial court in this instance was totally in non-compliance with the mandate of this Court that it is

> " . . . the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead and especially it should not be one sided;' "
>
> *Querica* v. *United States*, 289 U.S. 466, 470.

In *Querica* this Court relied upon its earlier opinion in *Starr* v. *United States*, 153 U.S. 614, where the prejudicial nature of the trial court's remarks prompted this court to reverse, saying:

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his slightest word or intimation is received with deference and may prove controlling."
>
> *Starr* v. *United States*, 153 U.S. 614, 626.

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Similarly, in *Glasser* v. *United States*, 315 U.S. 60, 71 this Court noted that

> " . . . upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."

The following specific instances illustrate the failure of the trial court to refrain from improperly influencing the jury by his remarks and demonstrate the absence of solicitude for the essential rights of petitioner.

(a) Cross examination of defendant by the court.

During the course of cross examination of defendant, who denied the allegations of fraud and testified that not only had he made no money in the business but had lost a total of $10,000 to $12,000 (Tr. 762-63), the court took over the cross examination and propounded a series of questions which, it is submitted, would have been improper even if asked by the prosecutor, and which clearly indicated that the court did not (and implied that the jury should not) believe petitioner's explanations. After several questions relating to the financing procedures followed, the court abruptly commented:

> "I am at a loss to understand why you continued to sell this paper at a loss." (A. 57)*

Following petitioner's answer, the court persisted:

> "How was it helpful to sell the paper at a loss?"

Similarly with respect to the financial details which were told to the various managers who were co-defendants in the case, the court likewise expressed skepticism and dis-

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*"A" designates the Appendix filed on behalf of Appellant in the Court of Appeals. The entire cross examination of petitioner by the Court appears in the Transcript at pp. 823-830.

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satisfaction with petitioner's answers. With respect to petitioner's answer that "as far as Mrs. Arrigo goes, and Chambers might have known, I don't know", the Court replied:

> Q. Well, don't you know whether he knew or not?
> A. I really don't know.
> Q. Why don't you know, he was your manager?

The argumentative and accusatorial nature and tenor of the court's cross examination of petitioner (Tr. 823-830) violated the rule that the court must " . . . be careful not to become an advocate for any of the parties." (*Ayash* v. *United States*, 10 Cir., 352 F. 2d 1009, 1010). As observed by the Court of Appeals for the Seventh Circuit in words equally applicable here:

> "The Government was represented by able trial counsel and there was no apparent reason why that counsel needed any help on the cross-examination of the defendant or defendant's witnesses. The trial court asked thirty-five questions of the defendant on cross-examination, and a number of them were so phrased that the jury might well have received the impression that the judge was doubtful of the truthfulness of many of the defendant's statements made under oath."
> *United States* v. *Hill*, 332 F. 2d 105, 106.

To the same effect are the words of Judge Learned Hand in *United States* v. *Marzano*, 149 F. 2d 923, 926 (2d Cir. 1949):

> " . . . the judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance, he must not take on the role of a partisan; he must not enter the lists: he must not by his ardor induce the jury to join in an hue and cry against the accused. The prosecution and judgment are two quite separate functions in the administration of justice; they must not merge."

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Clearly, the trial court below joined in the "hue and cry" against the petitioner and continued to do so throughout his instructions to the jury and submission of verdict forms.

(b) Instruction that certain facts were not disputed.

The trial court further injected himself into the prosecution of the case by instructing the jury as follows:

> "I don't think that there is any question, any substantial question in your minds that any number of acts were committed which are alleged to have been done by the overt acts which you will see in the indictment when you go to the jury room. The problem that you will have to decide is whether there was an agreement among these people to violate the law, and whether or not any such agreement, any particular defendant was a member of that. (A. 72, Tr. 968-969)

To the above instruction, illustrative of the court's impatience if not of his view of the evidence, the court added:

> "If there was any fraud involved it had to be by reason of the commission arrangement."

and

> " . . . if you should find from the evidence that the payment of these funds for these subsequent sales was impossible for the payment of $350 or $400 for the submission of 25 or 50 names were impossible, then, I think you will be justified in finding that the representatitons made with respect thereto were fraudulent." (A. 73-74, Tr. 973-975)

The above instructions violated the rule that it is ". . . inappropriate to instruct a jury that any portion of the government's evidence was undisputed." (*Flaherty* v. *United States*, 1 Cir., 355 F. 2d 924, 926). Moreover, in specifically directing the attention of the jury to the issue

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of the "impossibility" of payment of the commissions, the court again argumentatively and prejudicially assumed the role of an advocate and deprived defendant of a fair and impartial jury. Directly applicable are the words of the court in *Billeci* v. *United States,* D.C. Cir., 184 F.2d 394, 403:

> "The accused has a right to a trial by the jury. That means that his guilt or innocence must be decided by twelve laymen and not by the one judge. A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own verdict of the guilt or innocence of the accused."

(c) The court, after submitting the case to the jury late in the day, instructed it to return a verdict "this afternoon".

Following eleven days of trial the case was sent to the jury late in the day — presumably late in the afternoon*— with the following instruction here urged to be coercive of the verdicts of guilty which were returned that same afternoon:

> "Now, I am going to send you to the jury room and ask you to begin your deliberations, continue your deliberations for a reasonable period of time. If it appears that you are going to have to take a great

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*Although the Court of Appeals stated that nothing in the record indicates how late in the afternoon the jury got the case, the Brief for the government states at p. 7: "A reading of the transcript will reveal that it was late in the day when the case went to the jury . . ."

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deal longer than a reasonable hour, why, send word to me and I will see whether or not I can allow you to go home for the night and return to complete your deliberations tomorrow. But, I would like for you to see if you can arrive at a verdict this afternoon." (A. 75-76, Tr. 939)

It is respectfully submitted that the court below erroneously refused to follow its own previous holding in *Burroughs* v. *United States*, 10 Cir., 365 F. 2d 431, in allowing petitioner's conviction to stand. In *Burroughs* the same court held that it was reversible error

> " . . . to entreat them [the jury] to strive toward a verdict by a certain time. When these admonitions are considered in their context, they are subject to the clear inference that the judge was unduly anxious to conclude the lawsuit, and we think it entirely reasonable that the jury was aware of his anxiety. This type of verdict-urging on the part of the court tends to undermine the proper function of the common law jury system . . . "
>
> *Burroughs* v. *United States*, 365 F. 2d 431, 434.

The above instruction, viewed in the context of the earlier instruction (illustrating, it is submitted, impatience) that certain facts are undisputed, petitioner submits did indicate to the jury that the judge was "unduly anxious to conclude the lawsuit" and constituted an improper form of "verdict-urging."

While conceding that the instruction given in the instant case is "perilously close" to the instruction condemned in *Burroughs*, the court below dismissed the instant contention with the cryptic observation that the "circumstances and context are sufficiently different to require a different conclusion." (App. p. 15) The court then cited in a footnote the case of *Darby* v. *United States*, 283 F. 2d 896,

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898 (10th Cir. 1960). The case and page referred to indicate that *Darby* by no means lessens the applicability of *Burroughs*, for in *Darby* the court observed that the remarks " . . . were not addressed to the jury. They were addressed to counsel and jurors who participate in the succeeding case." Moreover, unlike the instant case, in *Darby* the court observed that the judge " . . . expressed the view that the jury would perhaps complete its deliberations by 3:00 o'clock, but there was no suggestion that they should do so." (*Darby*, p. 898).

Petitioner submits that failure of the court below to follow and apply its own prior decision in *Burroughs* is inconsistent and inexplicable and requires reversal. The circumstances here are indeed more compelling than in *Burroughs* because the court not only instructed the jury to reach a verdict by a certain time but by its argumentative assumption of the role of an advocate clearly indicated what that verdict should be.

The court was not, as stated by the court below, merely telling the jury that if they failed to reach a verdict that day it would dismiss them for the night and have them return in the morning. To the contrary, the court stated that if they did not reach a verdict that afternoon, he would then decide *if they would be allowed* to go home for the night or if they would be "locked up" for the night. The veiled threat that they might not be allowed to go home if they did not reach a verdict that afternoon thus magnified the otherwise coercive effect of the instruction.

(d) Court submitted only one form of verdict—a "guilty" form.

As a final gesture, perhaps of Freudian implications in view of the foregoing, the court submitted only one form of verdict to the jury, which read, as to each count:

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"We, the Jury in the above entitled cause, duly empaneled and sworn, upon our oaths, find the defendant ..... guilty in the manner and form as charged in the first count of the indictment." (The same form was repeated for each of the 15 counts.)

Nowhere in the record is there any instruction as to what the jury is to do if they wished to find the defendant not guilty of one or more of the various counts.

Petitioner submits that this manner of submission of verdict form in itself, and especially in the context of the instant case, violated the Sixth Amendment. As observed in a somewhat similar situation by the Ninth Circuit Court of Appeals in *Braley* v. *Gladden,* 403 F. 2d 858:

> "Furthermore, while a form for the returning of a guilty verdict was supplied to the jury, the court inadvertently neglected to suply the usual form for the return of a verdict of acquittal . . .
>
> A jury is required to presume that an accused is innocent until he is proved guilty, and a court presumes that the jury applies only that law of which it is informed, by the judge. Critical deficiencies cannot be supplied by inference or assumption as to the interpretation applied objectively by the twelve jurors, individually and collectively. While it may not be unreasonable to assume that the jury inferred from the instructions that it might be empowered to write its own form of a verdict of not guilty, it is equally reasonable to assume that the jury inferred that the judge intended that only one verdict was possible, a verdict of guilty, upon the one and only form which he supplied.
>
> "All recognize that a trial judge's influence upon the jury is profound. See, e.g., *Quercia* v. *United States,* 289 U.S. 466, 53 S. Ct. 698, 77 L. Ed. 1321 (1938); *Starr* v. *United States,* 153 U.S. 614, 14 S. Ct. 919, 38

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L. Ed. 841 (1894). Hence, the oversight in not furnishing the not guilty verdict form along with the opposite form constituted, in effect, a severely adverse comment by the trial judge, an impermissibly grave insinuation of judicial attitude toward the ultimate issue of guilt or innocence. Accordingly, we hold that the influence exerted by the trial judge, although unintended and probably resulting from a clerk's oversight, was so significantly irregular as to require a new trial."

Braley v. *Gladden,* 403 F. 2d 858, 859-960.

In view of the earlier assumption by the court of the role of an advocate, his instruction that certain issues were undisputed and his instruction that the jury should return a verdict that afternoon, is it not equally likely and indeed probable in the instant case that " . . . the jury inferred that the judge intended that only one verdict was possible, a verdict of guilty, upon the one and only form which he supplied"? (*Braley* v. *Gladden,* 403 F. 2d 458, 460).

Petitioner submits that each of above actions by the trial court, standing alone, was sufficient to deprive him of a fair and impartial trial by jury. Read together, each compounded the other, and their cumulative effect upon the jury should be considered by this Court and the judgment of the Court of Appeals should be reversed.

2. Admission at a joint trial of statements of co-defendants not in furtherance of the conspiracy but which inculpated petitioner requires reversal.

Petitioner respectfully urges that the Court grant his petition and reverse the judgment of the Court of Appeals in view of the Court's decision in *Bruton* v. *United States,* 391 U.S. 123 (1968).

During February of 1967, the month in which Brentwood went out of business and, as apparent from the testimony, after co-defendant Arrigo had withdrawn from any conspiracy with petitioner, government witness Ralph Noeth had a conversation with Arrigo. With reference to money owed by petitioner to Arrigo, the witness was allowed to testify as follows:

> "Q. (By the prosecutor) What specifically did she say about Mr. Glezerman, if you recall?
> A. Well, she said, I can't remember just exactly the words, but I do know the word 'crook' was used. He is a crook and because he owes us some money, the boy who installed our unit, he still owed him some money also." (Tr. 620-21)

Similarly, postal inspectors testified to various other statements by co-defendants which implicated petitioner. Inspector Langford testified that co-defendant Chambers told him he had left a previous operation run by petitioner because of "hot checks." (Tr. 690-99) Co-defendant Perella told inspectors that he had drained his own finances to loan money to petitioner and never got it back. He also told an inspector that he had left the Brentwood Company because of a violent argument resulting from the fact that petitioner " . . . would withdraw funds from the Grant Square Bank and keep that bank account broke most of the time." (Tr. 711) Similarly, Inspector Langford testified that Perella told him he was supposed to get $8,000 upon sale of the business and that he had never received it. (Tr. 711-714)

None of the above statements was made in the presence of petitioner or in furtherance of the alleged conspiracy. Although the indictment alleges that the conspiracy continued until December, 1967, it is obvious from the nature of the statements that in each instance the declarant no

longer regarded himself as associated with Brentwood or petitioner and had thus withdrawn from the conspiracy. Accordingly, admission of the statements, highly incriminatory as to petitioner, at a joint trial, violated the rule of *Bruton* v. *United States,* 391 U.S. 123 (1968).

Admittedly no objection was made by petitioner's court-appointed counsel to the statements at the time of their admission. Importantly, however, petitioner did move, prior to trial, for a severance. Under the circumstances, the court had a continuing duty to protect the rights of petitioner and failure to grant a severance when it appeared that petitioner was prejudiced by the inadmissible testimony was plain error.

Even prior to *Bruton,* there was ample authority in the Tenth Circuit for reversal of petitioner's conviction. In reversing for a violation of the rule of *Delli Paoli* v. *United States,* 352, U.S. 232, the Court in *Green* v. *United States,* 386 F.2d 953 (10th Cir. 1967), appropriately observed that, as here:

> "A pretrial motion for a severance had been made and denied, alerting the Court to the ever present possibility of prejudice in a joint trial."

The Court further stated that:

> "As pointed out in *Delli Paoli,* the jury in a conspiracy case has a heavy intellectual burden in sorting out, keeping in mind and applying the impact of testimony admissible for a limited purpose only. In the case at bar we are satisfied that the lack of a particularized and repetitive instruction upon the subject was error vitiating the conviction of all."
>
> *Green* v. *United States,* 386 F.2d 953, 957.

CONCLUSION

Because the trial court failed in its " . . . duty of seeing that the trial is conducted with solicitude for the essential rights of the accused" (*Glasser* v. *United States*, 315 U.S. 60, 71) it is respectfully requested that this Court grant the petition and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER, 1969, TERM

ALLAN MAURICE GLAZERMAN,

Appellant,

vs. No. 157-69

UNITED STATES OF AMERICA,

Appellee.

FRED JOHN PERELLA,

Appellant,

vs. No. 158-69

UNITED STATES OF AMERICA,

Appellee.

MRS. ZITA B. ARRIGO,

Appellant,

vs. No. 159-69

UNITED STATES OF AMERICA,

Appellee.

BILLY RAY MCDANIEL,

Appellant,

vs. No. 160-69

UNITED STATES OF AMERICA,

Appellee.

LESTER JOE CHAMBERS,

Appellant,

vs. No. 161-69

UNITED STATES OF AMERICA,

Appellee.

Appeal From The United States District Court For The Eastern District Of Oklahoma
(District Court No. 27579 Criminal)

Julius Lucius Echeles, Chicago, Illinois, for Appellant Allan Maurice Glazerman;

Sanford W. Smith, Muskogee, Oklahoma, for Appellant Fred John Perella;

Ernest R. Anthis, Jr., Muskogee, Oklahoma, for Appellants Mrs. Zita B. Arrigo and Billy Ray McDaniel;

Sam Caldwell, Muskogee, Oklahoma, for Appellant Lester Joe Chambers;

William J. Settle, United States Attorney, Muskogee, Oklahoma, for Appellee.

Before Picket, Hill and Seth, United States Circuit Judges.

Hill, Circuit Judge.

Appellants Glazerman,[1] Perella, Arrigo, McDaniel, and Chambers were charged by indictment with fourteen substantive counts of using the mails to defraud in violation of 18 U.S.C. § 1341, and one count of conspiracy in violation of 18 U.S.C. § 371. Each appellant was convicted by a jury on all fifteen counts, and each was sentenced to a term of imprisonment. This is a direct appeal from this conviction.

The last count of the indictment charged appellants with a conspiracy to use the mails to defraud running from March 1, 1966, until December 11, 1967. Counts one through six respectively charged that appellants, in an effort to

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[1] Throughout the record there is a discrepancy in the spelling of the name of appellant Glazerman. In some parts it is spelled Glezerman but the indictment, order of judgment and sentence and notice of appeal all use the name Glazerman.

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execute their alleged fraudulent scheme, mailed letters on September 30, October 23, November 13, October 18, December 21 and December 18, all in the year 1966. Similarly, counts seven through eleven charged appellants with mailing checks on December 7, September 6, September 20 and October 19 in the year 1966, and on January 16, 1967. Counts twelve through fourteen charged appellants with mailing letters on October 20, 1966, and January 21 and January 5 in 1967 for the alleged purpose of perpetrating a scheme to defraud. In summary, the dates excluding the conspiracy charge run from September 6, 1966, to January 21, 1967.

Appellants' first contention is that the evidence presented at trial was insufficient to sustain the guilty verdict. It is uncontroverted that the United States mails were used on the pertinent dates. So, the questions on the facts are whether there was sufficient evidence of a conspiracy, and whether there was sufficient evidence to support the jury's finding of a scheme to defraud. At the outset, we must reiterate that an appellate court, in determining the sufficiency of the evidence is confined to whether, viewing the evidence in the light most favorable to the prosecution, there is substantial evidence, either direct or circumstantial, which together with reasonable inferences sustains the verdict.[2]

The government's evidence showed that in early March, 1966, Glazerman incorporated Oklahoma Brentwood Company in Oklahoma. All the stock was held by Glazerman, and no other appellant was directly involved in the incorporation. Glazerman leased office space in Oklahoma City

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[2] *Bailey* v. *United States*, 410 F.2d 1209 (10th Cir. 1969); *Thomas* v. *United States*, 409 F.2d 730 (10th Cir. 1969); *Michael* v. *United States*, 393 F.2d 22 (10th Cir. 1968).

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on May 16, 1966. A corporate bank account was opened by him there, and on June 3, 1966, he filled out a signature card to become the authorized signatory for the corporation. On June 16, 1966, the signature card was revised to include Perella as an authorized signer. Glezerman also opened an office in Tulsa on August 1, 1966, and a bank account was opened in Tulsa on behalf of Brentwood on August 3, 1966.

Regarding management of the offices, Perella was made manager of the Oklahoma City office on June 15, 1966. Perella quit in the third week of September, 1966, and an undisclosed person took over management of the office. In Tulsa, Arrigo became manager around August 15, 1966, and stayed until late October or the first of November. McDaniel then took over the Tulsa office for about three weeks. When McDaniel quit, Chambers took over for a short time. Each person was hired by Glazerman.

Oklahoma Brentwood's business was selling built-in or centrally installed vacuum cleaners on a referral basis. Brentwood's salesmen called on people in their home and tried to interest them in buying one of these cleaners, which operated via inlets in the walls of the home. They sold the vacuum cleaners for $899 although the price could amount to as much as $1200 when financing charges were included. Substantial evidence indicates that the machine operated to the expectations of the purchasers, and few found fault with the quality of the merchandise.

The sales were made in connection with a referral program whereby customers were told they could earn commissions from Brentwood which would defray the cost of the vacuum they had purchased. The proposition was, if a customer would give Brentwood the names of 25 qualified persons to contact about buying a vacuum cleaner,

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the customer supplying the names would earn $350 in commissions. For 50 qualified names, Brentwood would pay $700. If any of these referrals purchased a vacuum, the customer submitting the referral's name would earn a $100 commission.

Brentwood generated leads to future sales through this referral system of selling. Brentwood's salesmen would take the previous customer's referral names back to the office along with a commission agreement authorizing Brentwood to use the customer's name to contact the referrals. Brentwood then sent a letter to the referral party over the name of the previous customer who had referred Brentwood to that party. The letter invited the referral party to allow a Brentwood representative to come into their homes and introduce them to "an exciting new program." Several days after the letter was mailed, Brentwood's phone girls would telephone the referral and ask them to make an appointment at their home with a Brentwood salesman. Up to this point, the referral party was told nothing about buying a vacuum cleaner. If an appointment was agreed to, a salesman would go to the referral's home and make a vacuum cleaner sales presentation while trying to enroll them into the referral program.

When a Brentwood salesman got into a prospective purchaser's home, the basic sales pitch was that Oklahoma Brentwood Company was forsaking media advertising and adopting word of mouth advertising via the referral program, and Brentwood was paying $350 for 25 qualified referral names in lieu of spending money on advertising. This sales pitch was supposed to be a uniform one for all salesmen, and it was adopted from a referral sales operation in Texas which Glazerman had begun before Oklahoma operations were started. A copy of the Texas sales pre-

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sentation was placed in evidence, and there was testimony that an identical format was brought to Oklahoma and used exclusively.

For the referral names to be qualified, the names had to be people who owned their own homes, who had good credit, and who would allow a Brentwood salesman to make a complete sales presentation to them. Brentwood's salesmen were supposed to contact the referrals, make a sales presentation and, depending upon whether the referral made a purchase, make out an acceptance or rejection slip on each referral. There was testimony that the slips were not always made out or turned in at the office. Also there was some conflicting evidence on whether the customers always knew that one element of qualifying their referrals was that a complete sales presentation had to be made to the referral.

When a customer purchased a vacuum cleaner he signed a conditional sales contract, a supplementary contract, and a commission agreement, and he got a copy of each. Upon making a sale, Brentwood's practice was to discount the note on the contract with a finance company. But the finance company would only tentatively take the paper until there was a showing the installment contract was satisfactory in all respects. To accomplish this, Brentwood would send a public relations man to interview the purchaser after the sale but prior to discounting the contract. The public relations man would see if the customer was satisfied with the vacuum, and they would go over the sales contract and commission contract (referral program) to clear up any misconceptions. The customer was to understand that the compensation under the earnings agreement did not in any way effect the obligation under the conditional sales contract. Customers signed a form

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stating that the only agreements made were those stated in the sales contract and commission agreement. After this was accomplished Brentwood would turn the contract over to the finance company. Then the finance company also had a representative contact the purchaser to make sure the purchaser understood all that he had agreed to. If all went well, the installment contract was discounted to the finance company.

Most of the alleged misrepresentations centered on the sales presentation and referral program. Customers were told that Brentwood was a well known company, that it had been spending large sums of money in media advertising for twelve years, and that it intended to spend two million dollars in referrals in Oklahoma in lieu of media advertising. Customers were told that they could recoup the costs of their vacuum through the referral program, and that others had done so and were making money now. The sales presentation said that 62% of the referrals contacted would purchase and that 25 referrals could be contacted in a month after the referral. The sales presentation indicated that there were two separate agreements: the sales agreement and the referral commission agreement. But the commission was the initial lure used to get into the customer's home; and it was the main emphasis of the sales presentation whose real object was to sell the customer a vacuum cleaner.

In considering whether the evidence is sufficient to warrant the jury's verdict, it is most appropriate and instructive to reiterate the words we used in Beck v. United States, 305 F.2d 595, at 598 (10th Cir. 1962): "Fraud or the existence of a fraudulent scheme is seldom susceptible to proof solely by direct evidence and in nearly every such case, direct and circumstantial evidence together with the inferences to be drawn therefrom must

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be relied upon for proof. On the face of the business operation involved here, it may be argued that it was merely a legitimate business venture that did not work out successfully. That, however, was a question of fact to be determined by the jury after considering all of the evidence and the inferences to be drawn therefrom."

We have carefully read the entire trial transcript which is composed of over 1000 pages covering a multitude of exhibits and witnesses. We find that there was sufficient evidence before the jury for them to find a scheme to defraud, a conspiracy to use the mails to execute the scheme, and overt acts which ripened the scheme. There is substantial evidence that referral customers were falsely told that Brentwood was well known, that it had spent money on advertising in the past, that two million dollars would be spent in the future, and that the program would make money for any referral customer that joined up. Some customers were falsely told that they were among the first contacted in their area, and no customer was told that it was mathematically impossible for every customer to make money once the community was saturated by people in the referral program.

The evidence is conflicting on whether customers were misled as to what was necessary to qualify the names they submitted as referrals. But even if they knew that one qualification was that a referral had to hear a complete sales presentation and sign an acceptance or rejection slip, it is clear that the customers were not told that the slips were not always made out or turned in. Perhaps the most enlightening evidence concerning the referral commission program is a witness' testimony that Mrs. Arrigo, while talking to the witness about becoming a saleswoman for Oklahoma Brentwood, said that it would never happen that

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$350 or $700 would be paid out on referral names, i.e., "they just wouldn't let it happen."

Since, however, an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy,[3] we have examined the record to determine whether each appellant was a member of the conspiracy at the time of the substantive offenses charged in the indictment. The record discloses that the substantive offenses occurred on dates beginning with September 6, 1965, and ending with January 21, 1967. Glazerman clearly was involved in the conspiracy at all times during that period. However, with regard to Perella, the uncontroverted evidence is that he started with Oklahoma Brentwood in mid-June, 1966, and quit in the third week of September, 1966. Consequently, he is criminally liable only on substantive counts 8 and 9 which are dated September 6 and 20, 1966, respectively, and on the conspiracy count. Similarly, Arrigo began on July 1, 1966, and worked through approximately November 1, 1966. Thus, Arrigo is liable on counts 1, 2, 4, 8, 9, 10, 12 and 15. With respect to McDaniel, he began in early October, 1966, and stayed on until January, 1967. So McDaniel can be liable only on counts 2, 3, 4, 5, 6, 7, 10, 12 and 15. Regarding the tenure of appellant Chambers, he is criminally liable for the counts beginning in late November. That includes counts 5, 6, 7, 11, 13, 14 and 15. The convictions of the appellants are reversed on the counts indicated. However, our rule is clear that if a person is convicted and sentenced concurrently on several

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[3] *Gradsky* v. *United States*, 376 F.2d 993 (5th Cir. 1967); See *Levine* v. *United States*, 383 U.S. 265 (1966); *Pinkerton* v. *United States*, 328 U.S. 640 (1945).

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counts, some of which are reversed on appeal, the judgment and sentence will not be reversed if the sentence does not exceed that which may be lawfully imposed on the valid counts.[4]

Having disposed of the sufficiency of evidence issue, we turn now to appellant Glazerman's additional points on appeal. He first contends that it was error not to grant his motion for severance. This contention is grounded upon the fact that the trial court permitted the jury to consider testimony concerning out-of-court statements against Glazerman made by the other defendants. The true nature of this contention is more aptly stated by the court in Bruton v. United States, 391 U.S. 123, at 137 (1968): "Here the introduction [of co-defendant's statements] posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore."

The statements which Glazerman complains about are: *First,* testimony by government witness Noeth that in February, 1967, he located Arrigo for the purpose of getting payment on a $100 Brentwood check which had bounced. Arrigo had long since ceased working for Brentwood and had a new job. According to Noeth, Arrigo at that time said Glazerman owned Brentwood, Glazerman owed Arrigo over $1,000, that Arrigo doubted if she would ever collect it, Glazerman owed other people money, and finally she referred to Glazerman as a crook. *Secondly,* a postal inspector was allowed to read into evidence a statement he had obtained from Perella wherein Perella said that he drained his own finances to loan money to Glazer-

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[4] *Romonito* v. *United States,* 400 F.2d 618 (10th Cir. 1968); *Marteney* v. *United States,* 218 F.2d 258 (10th Cir. 1955), *Cert. Denied* 348 U.S. 953.

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man, that twice before he had been in the referral business with Glazerman, that one of the businesses folded up and the other was sold, that Perella never received the money for his interest in the referral business which was sold. Also, Perella said he left Brentwood after a violent argument with Glazerman brought on because Glazerman withdrew funds from the bank account and kept the account broke most of the time. *Third,* McDaniel also made a statement to a postal inspector which the inspector read at the trial; it stated that Glazerman carried the bank book with him at all times, made all deposits, and wrote all the checks as far as McDaniel knew. *Fourth,* Chambers' statement to a postal inspector was introduced in a like manner and its contents relating to Glazerman are that Chambers had received several hot checks and as a result he had some difficulty with his personal checks. Chambers also said that Brentwood still owed him some $2000.

Regarding the postal inspector's testimony, the court and defense attorneys were earlier advised of the postal inspector's memorandums of the interviews with each co-defendant. Each defense attorney was shown the written memorandums at a conference convened to prune any objectionable matter from the memorandums. Parts of the memorandums were so deleted, and it was agreed that remaining parts would be read into evidence by the inspector. When the postal inspector was called to testify, the court excused the jury and asked defense counsel whether they had any objection to reading the memorandums. Only Chambers objected, and that on the basis that he was not fully advised of his rights when he made the statement.

Upon considering whether there was any error from allowing the statements into evidence, we first note that Glazerman failed to object to the introduction of the co-

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defendants' statements. But the possibility of serious prejudicial error compels us to go further and consider the point beyond the fact that counsel for Glazerman had the opportunity to go over the statements before they were introduced. Delving into this matter more fully, we find that Arrigo, Perella, and McDaniel subsequently testified at the trial, and Glazerman's counsel had the opportunity to cross-examine them. That this opportunity to cross-examine them provided sufficient confrontation of the witness is evident from a reading of Harrington v. California, 393 U.S. 250 (1969).

Additionally, we are convinced that any error in the admission of Arrigo, Perella, McDaniel and Chambers' extrajudicial statements about Glazerman was harmless error.[5] What appellant Glazerman calls accusatory statements do not in fact accuse him of the substantive or conspiracy offenses charged in the indictment against him. At the very most, the statements impinge upon Glazerman's credibility. Regarding his co-defendants' statements, we can only repeat what the Supreme Court said in Harrington v. California, supra, at 287: "Their evidence supplied through their confessions was of course cumulative. But apart from them the case against [Glazerman] was so overwhelming that we conclude that any violation of Bruton was harmless beyond a reasonable doubt . . . ."

Glazerman further complains on appeal that the trial judge assumed the role of an advocate, thus aligning himself with the prosecution. While appellant rightly admits that the trial judge is not a mere moderator or umpire and within reasonable bounds has the right to participate in eliciting the truth, appellant contends that the trial

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[5] *Harrington* v. *California*, 393 U.S. 250 (1969); see also *Cleaver* v. *United States*, 238 F.2d 766, 770 (10th Cir. 1956).

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judge's questions were unreasonable, argumentative, accusatorial, and prosecutorial. Glazerman sums up saying that the record clearly demonstrates the court's partisanship.

It can hardly be said that the trial judge's questions constituted extensive participation in the trial, particularly in view of the length of this trial and the voluminous testimony. Furthermore, the questions propounded to the witnesses by the court shed new light on the evidence. We cannot agree with appellant Glazerman that the record clearly demonstrates that the court was partisan. The court asked questions of prosecution witnesses as well as defense witnesses, and we perceive no difference in the treatment he gave each. It is noteworthy too that the trial judge, after Glazerman had left the witness stand, cautioned the jury not to take the court's inquiry of any witness as an expression of a view or an opinion on the part of the court concerning the facts in this case. The court reiterated this upon instructing the jury. We conclude this point by stating that the record here is in no way comparable to the cases cited by appellant Glazerman.

Glazerman also argues that the court invaded the province of the jury by stating in his instructions to the jury that there was no dispute as to certain elements of the case. Specifically, the court said, "And, finally, you must find that in addition to these things, the agreement and the membership in the conspiracy, that some overt act was committed to carry it out. I don't think that there is any question, any substantial question in your minds that any number of acts were committed which are alleged to have been done by the overt acts which you will see in the indictment when you go to the jury room. The problem that you will have to decide is whether there was an agree-

ment among these people to violate the law, and whether or not any such agreement, any particular defendant was a member of that."

Previously the court had instructed the jury on what an overt act is and had used the example of leasing office space in Tulsa. Besides this particular example, there were a number of overt acts which were alleged and which were proved without contradiction by the evidence of both the prosecution and defense. In this context, the trial judge's comment—that he thought there could be no substantial question in the jury's mind that some of the overt acts were performed—was an aid to the jury in defining exactly what question was before them.

While the trial judge may have to some extent dissected and analyzed the evidence, he did not distort or add to it. The court was not misleading or onesided, and there were no deductions not warranted by the evidence. The trial court did not exceed the mandate expressed in Sadler v. United States, 303 F.2d 664, 666 (10th Cir. 1962), and Minner v. United States, 57 F. 2d 506, 513 (10th Cir. 1932). We need only further add that at the end of his instructions, the trial judge asked if counsel had any objections. But appellant's trial counsel neither objected or offered any further instructions; thus this question was not properly preserved for review.

We next consider whether the trial court improperly urged the jury to return a verdict by the end of the same afternoon in which the case was submitted to them. Glazerman complains that the trial court, upon originally sending the jury to deliberate, said, "Now, I am going to send you to the jury room and ask you to begin your deliberations; continue your deliberations for a reasonable period of time. If it appears that you are going to have to take

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a great deal longer than a reasonable hour, why send word to me and I will see whether or not I can allow you to go home for the night and return to complete your deliberations tomorrow. But, I would like for you to see if you can arrive at a verdict this afternoon." Glazerman claims that when the jury returned a verdict that same afternoon, they were following the court's orders.

Nothing in the record indicates how late in the afternoon this instruction was given and the case submitted to the jury. Absent an indication that the jury was given a very short time to deliberate that afternoon, we can only conclude that the reasonable impact of the instruction was to advise the jury that they would be required to work for only a reasonable length of time that day and if they failed to reach a verdict by the end of the ordinary work day, the court would dismiss them for the night and have them return in the morning to complete their deliberations. We do not favor the words used in this instruction especially since it is perilously close to the instruction we found objectionable in Burroughs v. United States, 365 F. 2d 431 (10th Cir. 1966). But the circumstances and context are sufficiently different to require a different conclusion.[6]

Appellant Glazerman's last complaint on appeal is that the form submitted to the jury did not include a "not guilty" verdict,[7] and thus it deprived Glazerman of his

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[6] *Cf. Darby* v. *United States*, 283 F.2d 896, 898 (10th Cir. 1960).

[7] As to each count, the verdict form read, "We, The Jury in the above entitled cause, duly empaneled and sworn, upon our oaths, find the defendant ..... guilty in manner and form as charged in the first count of the indictment."

Sixth Amendment right to a trial by jury. We find no merit in the argument that implicit in the form was an insinuation of judicial attitude toward the ultimate conclusion of guilt or innocence.

Appellant Glazerman's convictions on all 15 counts are Affirmed. Appellant Perella's convictions on counts 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, and 14 are Reversed and his convictions on counts 8, 9 and 15 are Affirmed. Appellant Arrigo's convictions on counts 3, 5, 6, 7, 11, 13, and 14 are Reversed and the convictions on counts 1, 2, 4, 8, 9, 10, 12, and 15 are Affirmed. Appellant McDaniel's convictions on counts 1, 8, 9, 11, 13 and 14 are Reversed and his convictions on counts 2, 3, 4, 5, 6, 7, 10, 12 and 15 are Affirmed. Appellant Chambers' convictions on counts 1, 2, 3, 4, 8, 9, 10, and 12 are Reversed and his convictions on counts 5, 6, 7, 11, 13, 14, and 15 are Affirmed. Concluding we hold that the judgment and sentence on each of the valid counts remains in force and effect and the judgment and sentence on each of the invalid counts is null and void.